SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 73-1522

October Term, 1973

RAYMOND MARQUEZ,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Raymond Marquez, prays that a Writ of Certiorari issue to review the orders of the United States Court of Appeals for the Second Circuit, entered in this case on January 22, 1974.

OPINION BELOW

The opinion of the District Court (Weinfeld, J.) is annexed hereto as Exhibit "A". The opinion of the Court of Appeals for the Second Circuit affirming the order of the District Court is annexed hereto as Exhibit "B". The order of the Court of Appeals for the Second Circuit denying petitioner's application for rehearing is annexed hereto as Exhibit "C".

JURISDICTION

The order of the Court of Appeals was entered on January 22, 1974. On February 4, 1974, petitioner filed a petition for rehearing which was denied by the Court of Appeals on March 12, 1974. The jurisdiction of this Court is invoked under Title 28, United States Code Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the admitted perjury of two of the government's witnesses at petitioner's trial requires that he be granted a new trial, and what is the appropriate standard of review to be used in deciding petitioner's motion for a new trial.

2. Whether petitioner acted with due diligence in obtaining the evidence of perjury.

STATUTE AND RULE INVOLVED

Federal Rules of Criminal Procedure, Rule 33:

> The Court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within five days after verdict or finding of guilty or within such further time as the court may fix during the five day period.

STATEMENT OF THE CASE

The Record

The record of the Court of Appeals consists of all filed documents as well as the minutes of the hearing on petitioner's motion for a new trial.

The Facts

On December 10, 1970, petitioner, along with two co-defendants, was convicted, after a jury trial, of three counts of an indictment charging them with causing one Juan Nieves Monserrate to travel between New York City and Puerto Rico for the purpose of (1) distributing the proceeds of an illegal gambling operation; (2) committing extortion; and (3) conspiring to commig both these offenses. (18 U.S.C. Section 1952, 371).

This conviction was affirmed by the Court of Appeals (*United States v. Marquez*, 449 F.2d 89 (2d Cir. 1971) and a petition for a writ of certiorari was denied by the Supreme Court (*Marquez v. United States*, 405 U.S. 963 (1972).

Petitioner moved for a new trial on the grounds that two witnesses for the government had perjured themselves at petitioner's trial.

On April 30, 1973, a hearing was held on this motion (Weinfeld, J.).

On August 3, 1973, the motion was denied.

The denial of the motion was affirmed by the Court of Appeals and on March 12, 1974, the same court denied petitioner's application for rehearing.

The Trial

The government's charge was that petitioner, Marquez, was the head of a gambling operation. That Monserrate, an employee of that operation, was accused by Marquez of cheating the operation. Monserrate and his father-in-law, Thomas Alvarez, testified that Marquez accused Monserrate of cheating the operation and that $14,000 was owing to Marquez. Monserrate denied cheating Marquez, but Marquez, among others, threatened him and ordered him to go to Puerto Rico and get approximately $7,500 to settle this debt. Monserrate then flew to Puerto Rico and took $7,435 out of the bank and flew to Kennedy Airport. At Kennedy he was arrested by Federal agents and decided to cooperate. This cooperation led to the arrest of Marquez for the charges of which he was later convicted.

After the affirmance of Marquez's conviction, newly retained counsel, with the assistance of Pedro Lopez, obtained tapes of Monserrate and Alvarez which contained statements at variance with their trial testimony. At the hearing on the motion for a new trial, Monserrate and Alvarez admitted that their trial testimony that they were not cheating Marquez was false. Monserrate explained the reason for this perjury as being fear of reprisal by Marquez.

As to other portions of the taped interview of Monserrate and Alvarez which were at odds with their testimony at trial, the District Court found that the trial testimony was true.

REASONS FOR GRANTING THE WRIT

The issues raised in this case are of substantial importance to the effective administration of criminal justice, specifically relating to Rule 33 of the Federal Rules of Criminal Procedure. Petitioner moved under Rule 33 for a new trial on the grounds of the use of admitted perjury at his trial. This raises serious questions about the nature of such a motion where the newly discovered evidence shows the use at trial of admitted perjury.

There is considerable confusion between and within the circuits as to the standard to be employed in reviewing such motions.

1. Rule 33 of the Federal Rules of Criminal Procedure does not by its own terms differentiate between motions generally made on the basis of newly discovered evidence and those where the newly discovered evidence is to the effect that perjury was relied upon during trial.

The cases in the Circuit Court of Appeals have made this distinction. The rule, however, is not the same in each Circuit.

In *United States v. Polisi*, 416 F.2d 573, 576-77 (2d Cir. 1969) the appropriate standard was stated as:

> Where the conviction is shown to be based even in part upon perjured testimony, however, a court will not stop to inquire as to the precise effect of perjury, but will order a new trial if without the perjury the jury might not have convicted. *Mesarosh v. United States*, 352 U.S. 1 (1956); *Larrison v. United States*, 24 F. 2d 82 (7th Cir. 1928). 416 F.2d at 577

This standard is commonly called the *Larrison* test. See, *United States v. Miller*, 411 F.2d 825, 830 (2d Cir. 1969), and the cases cited therein.

In *United States v. DeSapio*, 435 F.2d 272 (2d Cir. 1970) cert. denied 402 U.S. 999 (1971), the Court of Appeals for the Second Circuit implied that the *Larrison* test should apply only to cases of prosecutorial misconduct.

> We are inclined to agree that the less severe *Larrison* test should be confined to cases of prosecutorial misconduct. 435 F.2d at 286 ftnt. 14.

Thus *DeSapio* leaves the clear implication that the *Berry v.*

State, 10 Ga. 511, 527 (1851) test will apply to a motion for a new trial based on the allegation of the use of perjured testimony at trial unless the government was a party to the perjury. See *United States ex rel. Rice v. Vincent*, ——F.2d——, (2d Cir. Slip op. 1655, 1666 2/7/74).

This leaves a Rule 33 motion predicated on the admitted use of perjury at trial, albeit without the knowledge of the prosecutor, in exactly the same position as one simply based on newly discovered evidence.

This is not proper. There is a real and fundamental distinction between these two situations. The effect of the use of perjury to convict is a far greater threat to "the untainted administration of Justice . . . " *Mesarosh v. United States*, supra at 14. Moreover, a conviction based on perjury is inherently more offensive than a conviction which resulted from the absence of some helpful evidence.

The cases in other Circuits as well as the opinions of noted commentators indicate the wide-spread awareness of the need to distinguish between these two types of Rule 33 motions.

The following cases directly or indirectly, adopt the *Larrison* test in perjury situations: *United States v. Smith*, 433 F.2d 149 (5th Cir. 1970); *Newman v. United States*, 238 F.2d 861, 862 f.1 (5th Cir. 1956); *Harrison v. United States*, 191 F.2d 874 (5th Cir. 1951); *United States v. Gerdon*, 178 F.2d 896 (6th Cir. 1949) cert. den. 339 U.S. 935; *United States v. Johnson*, 142 F.2d 588 (7th Cir. 1944); *United States v. Curran*, 465 F.2d 260 (7th Cir. 1972); *United States v. Briola*, 465 F.2d 1018, (10th Cir. 1972) cert. den. 409 U.S. 1108 reh. den. 410 U.S. 960.

One Circuit has gone as far as to imply that when perjury is the basis for a Rule 33 motion it should not really be thought of as "newly discovered evidence" and that the *Larrison* test should apply. *United States v. Meyers*, 484 F.2d 113, 116 (3d Cir. 1973).

Noted commentators treat the applicability of *Larrison* to perjury situations as axiomatic.

> If a trial court finds that a material witness did commit perjury, and without his testimony the jury might not have convicted, a new trial is necessary. 8A Moore's Federal Practice, Paragraph 33.06(1).

See, 2 Wright, Federal Practice & Procedure, §557.

This Court noted the existence of the *Berry* and *Larrison* tests but has not spoken on the issue of the areas of their respective applicability. *United States v. Johnson*, 327 U.S. 106, 111 f.5 (1946).

It would appear that there is a clear conflict as to the appropriate standard to be used to review Rule 33 motions based upon the use at trial of perjured testimony. This conflict should be resolved by this Court.

It is clear, that in the case, despite disclaimers to the contrary, that the *Berry* test was relied upon by the Courts below.

Here, the perjury of Monserrate and Alvarez is admitted by all parties. Thus, the suspicion attendant to recantation cases is not a factor. E.g. *United States v. Troche*, 213 F.2d 401 (2d Cir. 1954).

Petitioner suggests that the *Larrison* test should be applied and that under that test he should be granted a new trial.

The decision below refers to the double perjury in this case as cumulative and as affecting credibility only. This is erroneous.

Marquez asserts that the use of perjury in this case was material in two separate and distinct ways: First, as it affected the credibility of the witnesses, and second, its effect on the

substance of the defense. It is to the former that the Courts below address themselves.

Marquez, of course, contends that on the issue of credibility alone the effect of the perjury would warrant a new trial. Had the jury known that the witnesses had perjured themselves, they would have been entitled to disregard any part or all of the testimony of those witnesses. This effect must not be taken lightly, since these witnesses were the prosecution's entire case. cf *Giglio v. United States*. 405 U.S. 150 (1972).

It is not, however, the effect of the perjury on the credibility of the witnesses which Marquez stresses. The more significant impact of the perjury is its effect on the substance of the defense. This is virtually ignored in the opinion below.

The Court below in its opinion stated:

> "Whether or not Monserrate or his father-in-law cheated Marquez' policy operation was not an element of the crimes charged against him or directly related to his guilt or innocence. (A-8)* Most importantly, however, the question of cheating was tangential to the principal issues; it went principally to credibility; it did not touch upon the essential elements of the crime". (A-10)

This trial presented a clear choice of which theory to accept, that of the government or that of the defense. The government alleged that Monserrate went to get this money because of threats made by the defendants. The defense contended that Monserrate returned the money voluntarily.

Without the exposure of this perjury the jury was left with a choice which did not reflect the reality of the situation. The jury

* References are to petitioner's appendix and are designated "A".

was led to believe that Monserrate and Alvarez did not cheat Marquez and that Monserrate therefore was taking the money out of his own pocket to give to Marquez. Certainly, this is difficult to believe and the inference of coercion is virtually unavoidable. The truth was that Monserrate and Alvarez had cheated Marquez. Moreover, an amount far less than that which he received was agreed upon to settle the matter. This would have presented a very different picture to the jury.

Monserrate had cheated petitioner and made an advantageous deal to settle the matter. His swiftness in attempting to return the money is explained as easily by this as by possible coercion.

So, this seemingly minor perjury (in the context of credibility alone) really changed the entire perspective in which the jury viewed the case. Glib comments that petitioner's theory approaches incredibility or that it was a sham are not helpful in determining the impact of the perjury on this trial.

Furthermore, Monserrate's explanation for his perjury is absurd. He was willing to testify against Marquez and face supposed reprisal, but was afraid to admit he was a cheat. Of the two acts, it is the former, if either, which would evoke reprisal.

Virtually any perjury can be characterized as going only to credibility. For example: a witness testifies on direct that he saw defendant commit a crime and on cross-examination testifies that he did not see defendant commit the crime and that he lied on direct. It could be said that this affected credibility only in that it placed two versions of the events before the jury which then would decide which it chose to believe. Clearly, there is an effect on both credibility and substance. On the other hand, a witness is asked on cross-examination if he has ever been convicted of a crime and he answers no. This is then shown to be perjurious. In this letter example, the only purpose for the question was to impeach credibility and the perjury would only affect credibility.

The facts of this case are much more akin to the first example than the second. The underlying reason for the line of questions about cheating was not to show a prior bad act to impeach credibility, but rather to establish a basis for the theory of the defense. That it may also have had an impact on credibility is not controlling.

When the effect of the perjury admitted at petitioner's trial is viewed in this light, a new trial is required.

> The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in federal courts (citations omitted). Therefore, fastidious regard for the honor of the administration of justice requires this Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted. (citations omitted) *Mesarosh v. United States*, supra, at 14.

2. The finding below of a lack of due diligence on the part of Marquez is based on an incorrect reading of the hearing minutes. The Courts below relied on a slip of the tongue on the part of Lopez to the effect that he first spoke to Marquez's current counsel in the Spring of 1971. (41B-42B)** See opinion below (A17).

The line of questions preceding this testimony indicates that counsel was following a chronological sequence. The reference to the Spring of 1971 clearly refers to the Spring of 1972. On redirect, this matter was cleared up when Lopez testified that the first time he met with present counsel was the Spring of 1972 (73B).

** References are to the appendix in the Court of Appeals and are designated "B".

CONCLUSION

FOR THE REASONS STATED ABOVE THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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